UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALLISON, MICHELLE	:	CIVIL ACTION NO. 3:06 cv 01826 (SRU)
Plaintiff	:	
VS.	:	
	:	
HEALTH CARE RELIANCE, LLC and and DANA, ERIC	:	
Defendants	:	OCTOBER 1, 2007

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and the Local Rules of this Court, Health Care Reliance, LLC (hereinafter, "HCR") and Eric Dana (hereinafter, "Dana"), the defendants herein, respectfully submits this memorandum of law in support of its Motion for Summary Judgment, as well as the attached Statement of Material Facts pursuant to Local Rule 56(a)(1) and supporting affidavits and exhibits.

I. Introduction.

This action arises out of the defendant's decision not to promote the plaintiff and the subsequent termination of her employment. The plaintiff alleges in her five-count Complaint that her termination and the failure to receive promotion prior to that termination violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") (Counts 1 and 3), Conn. Gen. Stat. § 46a-60(a)(1) (Counts 2 and 4), and 42 U.S.C. § 1981 (Count 5), by discriminating against her on the basis of her race, color and national origin.[1]

II. Statement of Facts

Defendants hereby refer to the statement of facts submitted pursuant to Local Rule 56(a)1 accompanying its *Motion for Summary Judgment* and this memorandum.

III. Argument

A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party opposing a motion for

[1] While plaintiff brought discrimination claims under Title VII, 42 U.S.C. § 1981, and the Connecticut Fair Employment Practices Act ("CFEPA"), each of these claims is analyzed under the same burden-shifting framework initially set forth in McDonnell Douglas Corp v Green.411 U.S. 792 (1973). See Burford v. McDonald's Corp, 321 F, Supp. 2d 358, 362 & n.3 (D. Conn 2004) (in analyzing CFEPA claims, courts apply the same standards as in Title VII cases); Dep't of Health Servs v Comm'n on Human Rights & Opportunities, 198 Conn. 479, 489 (1986) (same); Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 (2d Cir. 2000) (same; section 1981); also Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 347 n. 2 (7th Cir.) ("In analyzing § 1981 claims, we apply the same standards as in Title VII cases."), cert. denied, 528 U.S. 874, 120 S.Ct. 178, 145 L.Ed.2d 150 (1999).

summary judgment "may not rest upon the mere allegations or denials of [his] pleading, but [his] response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In determining when a party has raised a genuine issue of material fact, the Supreme Court has stated, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986) (citations omitted). Indeed, a plaintiff may not get to a jury without "any significant probative evidence tending to support the complaint." Anderson, 477 U.S. at 249 (quoting, First Nat'l Bank of Arizona v. Cities Servs. Co., 391 U.S. 253, 290 (1968)). The moving party's burden may be fulfilled by "pointing out to the District Court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

The Second Circuit has stated that the "mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." Yerdon v. Henry, 91 F.3d 370, 374 (2d Cir. 1996), quoting, Anderson, 477 U.S. at 252; see also, Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999), cert. denied, 530 U.S. 1242 (2000) ("An inference is not a suspicion or guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that is known to exist."). Further, the Second Circuit has stated that the non-movant "cannot rely on inadmissible hearsay in opposing a motion for summary judgment." Burlington Coat Factory Warehouse Corp. v. Espirit de Corp., 769 F.2d 919, 924 (2d Cir. 1985). Thus, "even in the discrimination

context, a plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985). In fact, the plaintiff's evidence must be precise and specific, and may not be based on conjecture and surmise. Bickerstaff, 196 F.3d at 451 ("affidavits must be based upon 'concrete particulars,' not conclusory allegations."); Lisa's Party City, Inc. v. Town of Henrietta, 185 F.3d 12, 17 (2d Cir. 1999); see also, McLee v. Chrysler Corp., 109 F.3d 130, 135 (2d Cir. 1997) (plaintiff's rationalizations are insufficient to create genuine issues of material fact).

As the Court of Appeals for the Second Circuit has recognized, "[g]iven the ease with which [law]suits may be brought and the energy and expense required to defend such actions," the use of summary judgment is an integral part of the litigation process. Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert. denied, 474 U.S. 829 (1985); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Indeed, "[s]ummary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.' " Reeves v. Johnson Controls World Servs., Inc., 140 F.3d 144, 149 (2d Cir. 1998) (*citing* Celotex Corp., 477 U.S. at 322). The non-moving party must "offer 'concrete evidence from which a reasonable juror could return a verdict in his favor' . . . and is not entitled to a trial simply because the determinative issue focuses upon the [moving party's] state of mind." Balut v. Loral Elec. Sys., 988 F. Supp. 339, 343 (S.D.N.Y. 1997). The party opposing the motion cannot simply rely upon speculation, unsupported assertions or conclusory statements. *Id.*; Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995).

B. The Defendants Are Entitled To Summary Judgment On The Plaintiff's Claims As There Are No Genuine Issues Of Material Fact

1. Plaintiff Fails To Establish Any Direct Evidence Of Discrimination

Plaintiff cannot prove discrimination for either her claim of failure to promote or termination through direct evidence. In the Second Circuit, direct evidence is that which proves the fact in question, without resort to inferences, such as a derogatory remark about a person's race or a stated discriminatory reason for specific conduct in question. See Kilroy v. Mount St. Mary College, 152 F.3d 918, (2d Cir. May 11, 1998) (affirming summary judgment where, among other factors, there was no record evidence suggesting plaintiff was subjected to any discriminatory comments); Lizardo v. Denny's, Inc. 270 F.3d 94, 104 C.A.2 (N.Y.),2001. (affirming summary judgment and emphasizing that employees for the defendant had made no statements with any racial content or overtone to prospective patrons).

Allison has offered no direct evidence to support any of her discrimination claims. On the issue of her race as a factor for the defendant's decisions, she was asked the following questions and gave the following responses:

Q. Ms. Allison, why do you think Health Care Reliance terminated your employment or asked you to resign?

A. I believe because of -- I believe I was terminated because Mr. Dana did not want to have the opportunity to have me -- give me the opportunity to work as director of nurses. He took the job away from me and gave it to a white woman. And I believe that he did not want me as a black woman working in that position.

Q. Okay. Upon what facts do you predicate that belief?

A. Just the fact that he took the job away from me and gave it to a white woman.

Q. Did anyone tell you that you were discharged for that reason?

A. No but that's what I felt.

Q. Are you aware of any documents that would substantiate that belief that you were discharged because he did not want a black woman to be in that position?

A. No, I'm not aware of any document.

(Deposition of Michelle Allison at pages 130-131)

Q. Well, describe each and every act of discrimination by Eric Dana?

A. He took the job away from me and gave it to a white woman.

Q. Anything else?

A. And he terminated me basically based on the fact that he did not want to promote me.

Q. Ms. Allison, was your work environment at Ellis Manor ever hostile, intimidating or offensive due to your race, color or national origin?

A. Not that I can recall.

Q. Did anyone ever tell jokes or stories related to your race, color or national origin at Ellis Manor?

A. Not that I can recall.

Q. Did you ever see documents. . . around the workplace which disparaged your race, color or national origin?

A. No.

(Deposition of Michelle Allison at page 133)

The fact that Plaintiff is black and the successful applicant was white does not constitute direct evidence of discrimination nor is it sufficient to survive summary judgment. During v. City Univ., 2005 U.S. Dist. LEXIS 20405 at *25 (S.D.N.Y. 2005) ("The mere fact that Plaintiff falls within a protected group and an individual outside that group was chosen over him does not raise an inference of discrimination."); Fayson v. Kaleida Health, Inc., 2002 U.S. Dist. LEXIS 18591 *27-28 (W.D.N.Y. 2002) ("Fayson

offers no evidence of discrimination other than the fact that Ward is a white male which, standing alone, is insufficient"); Wolde-Meskel v. Argus Cmty., Inc., 2001 U.S. Dist. LEXIS 11261, 28-29 (S.D.N.Y. 2001) (granting summary judgment where plaintiff offered no evidence of discrimination).

Accordingly, Plaintiff cannot allege any direct evidence of discrimination, and must rely exclusively on circumstantial evidence.

2. Plaintiff Fails To Establish Her Discrimination Claims Through Indirect Proof

Absent direct evidence of discrimination, Allison must prove her case through indirect proof. The analytical framework for evaluating claims of discrimination by way of indirect proof was set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green. 411 U.S. 792, 802-04 (1973) and Texas Dep't of Community Affairs v. Burdine. 450 U.S. 248, 257 (1981). The Second Circuit has interpreted this standard in several cases, including Viola v. Philips Medical Syg, 42 F.3d 712, 715-16 (2d Cir. 1994) and Rosen v Thornbiirgh. 928 F.2d 528, 532 (2d Cir. 1991).

a. The McDonnell Douglas Burden-Shifting Framework

i. Plaintiff's Prima Facie Case

To prevail on claims of race and color discrimination, Plaintiff must first establish a prima facie case of discrimination by showing: 1) membership in a protected class; 2) qualification for the position; 3) an adverse employment action; and 4) the existence of circumstances giving rise to an inference of discrimination based on his race and/or color.

Reeves v. Sanderson Plumbing Products. Inc., 530 U.S. 133, 142 (2000); Fisher v. Vassar College. 114 F.3d 1332, 1335 (2d Cir. 1997), cert. denied. 522 U.S. 1075 (1998); McLee v. Chrysler Corp., 109 F.3d 130, 134 (2d Cir. 1997).

ii. **Prima Facie Case Modified For Failure To Promote**

"In failure-to-promote cases brought under Title VII, courts follow the now-familiar, burden-shifting Title VII analysis first announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)...." where "the Supreme Court 'set forth the basic allocation of proof in a Title VII case alleging discriminatory treatment.' The initial burden in a disparate treatment claim brought under Title VII is on the plaintiff to establish a prima facie case of discrimination." Johnson v. State of Connecticut, Dept. of Corrections, 392 F. Supp. 2d 326, 333 (D. Conn. 2005) (Citations omitted).

"To establish a prima facie case of a discriminatory failure to promote, a Title VII plaintiff must ordinarily demonstrate that: '(1) she is a member of a protected class; (2) she 'applied and was qualified for a job for which the employer was seeking applicants'; (3) she was rejected for the position; and (4) the position remained open and the employer continued to seek applicants having the plaintiff's qualifications.' " Petrosino v. Bell Atlantic, 385 F.3d 210, 226 (2d Cir. 2004), quoting Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d Cir. 1998). In other words, Plaintiff must show that he applied for an available position for which he was qualified, but was rejected under circumstances that give rise to an inference of unlawful discrimination. Brown v. Coach Stores. 163 F.3d

706, 709-710 (2d Cir. 1998); Trindade v. Leavitt, 2005 U.S. Dist. LEXIS 21057 at *12-13 (E.D.N.Y. 2005).

iii. Defendant's Legitimate, Nondiscriminatory Reason For Its Action

Once Plaintiff has established his prima facie case, the burden then shifts to Defendant to proffer a legitimate, nondiscriminatory reason for the adverse employment action. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000); "This burden is one of production, not persuasion; it can involve no credibility assessment." Id (citation omitted; internal quotations omitted). At this stage, Defendant need only proffer, not prove, the existence of a nondiscriminatory reason for their employment decision. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-256 (1981), See Fisher, 114 F.3d at 1337 (holding that the presumption of discrimination disappears once the employer has proffered a legitimate business reason for the adverse action). If plaintiff meets this initial burden, defendant must proffer a nondiscriminatory reason for its decision. James v. N.Y. Racing Ass'n, 233 F.3d 149, 154 (2d Cir. 2000); Schnabel v. Abramson, 232 F.3d 83, 88 n.2 (2d Cir. 2000). Defendant has only a burden of production not persuasion. Reeves. 530 U.S. at 142. Once defendant meets its burden of production, plaintiff may " "come forward with evidence that the defendant's proffered, non-discriminatory reason is a mere pretext for actual discrimination." Weinstock. 224 F.3d at 42. It is not enough to disbelieve the employer; rather, the fact finder must believe Plaintiff's theory of intentional discrimination. Reeves, 530 U.S. at 147. Throughout this entire analysis, Plaintiff has the "ultimate burden" of proving intentional discrimination.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Schnabel, 232 F.3d at 90.

iv. Plaintiff's Demonstration of Pretext

Once Defendant has met its burden of production, Plaintiff must demonstrate that the legitimate reasons offered by Defendant were not its true reasons for the adverse action, but were merely a pretext for impermissible discrimination. Reeves, 530 U.S. at 143. See Farias v. Instructional, Sys., Inc., 259 F.3d 91, 99 (2d Cir. 2001) (summary judgment granted because the plaintiffs did not produce any evidence of national origin or race discrimination to rebut the defendant's legitimate, nondiscriminatory grounds for its actions). "Although the intermediate evidentiary burden shifts back and forth under this framework, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Reeves, 530 U.S. at 143 (citation omitted; internal quotations omitted).

v. To Avoid Summary Judgment. Plaintiff Must Come Forward With Specific Facts Supporting His Allegations Of Discrimination

Plaintiff cannot avoid summary judgment "through reliance on unsupported assertions," but "must come forward with evidence that would be sufficient to support a jury verdict in [her] favor," Goenaga v. March of Dimes Birth Defects Found. 51 F.3d 14, 18 (2d Cir. 1995). "[T]o defeat summary judgment, the plaintiffs admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole

or in part on discrimination." Stern v. Trustees of Columbia Univ., 131 F.3d 305, 312 (2d Cir. 1997). Conclusory statements of discrimination, unsupported by specific facts, are insufficient to avoid summary judgment- Bickerstaff v. Vassar College, 196 F.3d 435, 452 (2d Cir. 1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.").

As the Second Circuit emphasized in Bickerstaff:

> [Lower courts] must also carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. This undertaking is not one of guesswork or theorization. After all, "[a]n inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]." 1 Leonard B. Sand, et al., Modern Federal Jury Instructions ¶ 6.01, instr. 6-1 (1997). Thus, the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all of the circumstances. As a jury would be entitled to review the evidence as a whole, courts must not view the evidence in piecemeal fashion in determining whether there is a trial-worthy issue. Stern v. Trustees of Columbia University in City of New York, 131 F.3d 305, 314 (2d Cir. 1997); Danzer v. Norden Sys., Inc., 151 F.3d 50, 57 (2d Cir.1998).

Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999) As set forth in more detail below, plaintiff offers nothing - not even speculation and innuendo - in support of his allegations of discrimination against . . .and she offered absolutely no evidence linking any adverse decision to her race, color or national origin.

"Further, [i]f the plaintiff's evidence was barely sufficient to make out a prima facie case, it may not be sufficient to establish discrimination after the defendant has proffered a neutral rationale." Stern v. Trustees of Columbia University in City of New York, 131 F.3d 305, 312 (2d Cir. 1997) .

Evidence sufficient to establish the minimal prima facie case combined with evidence of falsity of the employer's proffered reason for the employment decision may not be sufficient to satisfy the plaintiff's burden. James v. New York Racing Ass'n., 233 F.3d 149, 155-57 (2d Cir. 2000). Thus, if Plaintiff can offer proof that the Defendants' stated reasons for their actions were false, a genuine issue of material fact is not necessarily created. Indeed, proof of the falsity of a defendant's stated non-discriminatory reasons does not mean that the true reason was an impermissible consideration. Thus, the Second Circuit "mandates a case-by-case approach, with a Court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff'" Schnabel v. Abramson. 232 F.3d 83, 90 (2d Cir. 2000). Hence, "the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove - particularly discrimination." James v. New York Racing Ass'n., 233 F.3d 149, 157 (2d Cir. 2000).[2] In analyzing that evidence, "a court is not to second-guess the defendant's judgment as long as it is not for a discriminatory reason." Cunliffe v. Sikorsky Aircraft Corp., 9 F. Supp. 2d 125, 132 (D. Conn. 1998).

b. Failure to Promote (Counts 1 and 2)

i. Plaintiff Fails to Show Even a Prima Facie Case of Discrimination In Her Failure to Promote Claim Because She Was Not Qualified for the Director of Nursing Services Position

[2] The Second Circuit has determined that the Supreme Court's opinion in Reeves v. Sanderson Plumbing Prods., Inc. 530 U.S. 133, 120 S. Ct. 2097 (2000) does not overrule and, in fact, is in harmony with, Second Circuit precedent in this area, as set forth in Fisher v. Vassar College. 114F.3d 1332 (2d Cir. 1997). cert. denied. 522 U.S. 1075 (1998). James, 233 F.3d at 155-57.

Allison cannot make out even a prima facie case of discrimination because she, by both her own admission and the opinion of her supervisor, was not qualified for the DNS position. Whether an individual is "qualified'' for a job must be assessed in relation to the criteria the employer has specified for the position, not criteria that seem reasonable to the litigant or to the Court. Thornley v. Penton Publ., 104 F.3d 26, 29 (2d Cir. 1997); Sarmiento v. Queens College, 2005 U.S. Dist. LEXIS 6117, 10-11 (E.D.N.Y. 2005). An employer's decision regarding whether a particular candidate is qualified for a job is entitled to deference. Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985); Bickerstaff v. Vassar College, 196 F.3d 435, 455-456 (2d Cir. 1999); Sarmiento. 2005 U.S. Dist. LEXIS 6117 at 10-11. Finally, it is plaintiff's burden to set forth evidence demonstrating that he met the qualifications for the DNS position. See Trindade. 2005 U.S. Dist. LEXIS 21057 at *13-14 ("Plaintiff has not offered any evidence that he was qualified for an upgrade to GS-14 or would have been. . . if his prior training were taken into account."); Sanchez v. Univ. of Conn. Health Care, 292 F. Supp. 2d 385, 394 (D. Conn. 2003) (unable to establish a prima facie case because plaintiff was unqualified for the positions at issue); Siano v. Haber, 40 F.Supp.2d 516, 524-25 (S.D.N.Y. 1999) (plaintiff not qualified for position at issue and offered no evidence of discrimination).

Both the plaintiff, herself, as well as her supervisor at Ellis Manor, Gail Lagana proffered a negative opinion as to Allison qualifications to undertake the DNS position. Upon tendering her resignation as Ellis Manor's DNS, Lagana approached Allison to inform her that Dana would be asking Allison whether she was interested in taking the DNS position. Allison responded that she didn't believe she was "ready for that position

at that time" (Allison Deposition at page 93) and she, then, expressed same to Dana (Dana Deposition at page 141). Lagana, as well, expressed the opinion that Allison needed more experience and that she should not take the DNS position (Lagana Deposition at page 41)[3] and, furthermore, informed Dana that Allison was not ready to take the DNS Position (Lagana Deposition at page 41; Dana Deposition pages 141-142). Allison, thereafter, approached Dana the following day and indicated that she wanted to "give the job a chance" (Allison Deposition at page 93). Dana responded by indicating that he would, nonetheless, advertise the position "to see if he got any qualified candidates" (Allison Deposition at page 93) and that he would not hire anyone with equal or less experience than that of Allison (Dana Deposition at page 147).

As Allison has failed to demonstrate she was qualified for the DNS position she has failed to satisfy the second element of this prima facie case and is fatal to her claim. See Lizardo, 270 F.3d at 104 (affirming summary judgment where the plaintiffs failed to establish the similarly situated element of their prima facie case).

ii. Plaintiff Fails to Show Even a Prima Facie Case of Discrimination In Her Failure to Promote Claim Because Defendants Did Not Seek Applicants Having The Plaintiff's Qualifications

Plaintiff cannot make out even a prima facie case of discrimination also because the defendant's did not seek other applicants having the plaintiff's qualification for the DNS position. To the contrary, the defendant sought candidates with prior experience as a director of nursing services whereas the plaintiff had none (See Resume of Michelle Allison attached as Exhibit P).

[3] Albiet, Allison denies that Lagana expressed to her that she needed more experience. (Allison Deposition at page 87).

As stated, Dana did advertise the DNS position "to see if he got any qualified candidates" (Allison Deposition at page 93) and he would not hire anyone with equal or less experience than that of Allison (Dana Deposition at page 147). In response to his advertisement, he received inquiries from seven different candidates (See Candidates' Resumes attached as Exhibits I - O). Of the seven candidates, Dana interviewed three. And each candidate interviewed possessed experience as a director of nursing. The first interviewed candidate, who was interviewed by phone (Dana Deposition at page 83), had been a director of nursing services for approximately three years (See Exhibit L) . The second interviewed candidate had been a director of nursing services for approximately four years (See Exhibit M) . The third interviewed candidate and ultimate hire, Elizabeth Johnson, had been a director of nursing services for approximately four years and had been previously employed by the defendants (Allison Deposition at page 110-111; See Resume of Elizabeth Johnson attached as Exhibit O). The plaintiff, though, had no experience as a director of nursing services (See Resume of Michelle Allison attached as Exhibit P) and defendants, clearly, sought candidates with greater qualifications and, thus, plaintiff has failed to satisfy the fourth element of this prima facie case and is fatal to her claim. See Lizardo, 270 F.3d at 104.

iii. Defendant Articulated A Legitimate, Nondiscriminatory Reason For Its Denial Of Promotion And Plaintiff Has Not And Cannot Prove Such Reason Was Pretextual

Even were Ms. Allison capable of proving a prima facie case for discriminatory denial of a promotion to the DNS position, this would not foreclose summary judgment. Rather, in the face of a prima facie showing of discrimination, "the burden shifts to the

defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action in question. Once the defendant provides such a reason, the plaintiff shoulders the burden of showing 'sufficient proof for a reasonable jury to find the proffered legitimate reason merely a pretext' for discrimination." Ferraro v. Kellwood Co., 440 F.3d 96, 100 (2d Cir. 2006) *citing* Richardson v. N.Y. State Dep't of Corr. Servs., 180 F.3d 426, 443 (2d Cir.1999)..

Defendant Eric Dana cited numerous legitimate business reasons for the decision not to promote plaintiff to the DNA position. Among them were (1) the plaintiff's admission that she was not qualified for the position (Dana Deposition at page 141); (2) Gail Lagan's opinion to Dana that Allison did not have the requisite experience for the position (Dana Deposition at page 141; Lagana Deposition at page 41-42); (3) Gail Lagana expressed concern regarding plaintiff's interpersonal skills (Dana Deposition at page 141); (4) Dana's discussions with at least ten employees at Ellis Manor who worked with plaintiff and expressed, for one reason or another, that she was not qualified for the DNS position (Dana Deposition at pages 141-147) and (5) that the ultimate hire had experience as a director of nursing whereas the plaintiff had none (see Resume of Elizabeth Johnson attached as Exhibit O and Resume of Michelle Allison attached as Exhibit P).

In light of this foregoing reasons, "[t]o survive a motion for summary judgment, [plaintiff] need not show evidence definitively proving that [defendants denied her a promotion] because of her [race, color and national origin]. She must, however, offer some evidence, such as the falsity of [defendant's] stated legitimate reason[s], from which one may infer the ultimate fact of discrimination. This she has not done." Ferraro v.

Kellwood Co., 440 F.3d 96, 100 (2d Cir. 2006) *citing* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149 (2000). Even if Ms Allison could make out a prima facie case, she still cannot show that Dana's reason for not selecting her was pretextual, let alone discriminatory. As Allison has not offered any evidence suggesting discrimination, she "must show that [she was] not only qualified for the position, but that [she was] the best-qualified candidate for the job under the criteria suggested by the employer." Wolf v. Bd. of Educ., 162 F. Supp. 2d 192, 199 (S.D.N.Y. 2001). "Thus. . . when a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications ignored by an employer. . . the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff. . ." Byrnie v. Town of Cromwell Bd. of Educ., 243 F.3d 93, 103 (2d Cir. 2001). A factfinder's role is not to second guess the hiring decisions of employers. See Davis v. State Univ. of New York, 802 F.2d 638, 641 (2d Cir.1986) ("The employer need not prove that the person promoted had superior objective qualifications, or that it made the wisest choice, but only that the reasons for the decision were non-discriminatory."). "When a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn." Obradovich v. New York City Bd. of Educ., No. 89 Civ. 7211(CSH), 1993 WL 97307, at *4 (S.D.N.Y. Mar. 31, 1993). Further, several courts have observed that a plaintiff must show that the disparity in qualifications was "so apparent as virtually to jump off the page and slap you in the face." Cofield v. Goldkist Inc., 267 F.3d 1264, 1268 (11th Cir. 2001); see, e.g.,

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1319 (10th Cir. 1999); Odom v. Frank. 3 F.3d 839, 847 (5th Cir. 1993); Ruiz v. Posadas De San Juan Assocs., 124 F.3d 243, 251 (1st Cir. 1997); Kobrin v. University of Minn. 34 F.3d 698, 704 (8th Cir. 1994).

As stated, supra, it is clear that Johnson had far superior qualifications for the DNS position. In any event, even if Allison could demonstrate that she was equally qualified with Ms. Johnson, which she cannot, her claim still would fail as a matter of law. See Fayson v. Kaleida Health, Inc., 2002 U.S. Dist. LEXIS 18591, 27-28 (W.D.N.Y. 2002) ("inasmuch as Fayson concedes that Ward is equally qualified, her claim fails as a matter of law").

c. Termination (Counts 3 & 4)

i. Plaintiff Fails To Establish A Prima Facie Case Of Discrimination

Ms. Allison fails to establish a prima facie case of race, color and national origin discrimination because she does not proffer any evidence giving rise to an inference of discrimination under the McDonnell Douglas burden-shifting framework. Plaintiff's claim fails the fourth prong of her prima facie case because she cannot show that her employment was terminated under circumstances giving rise to an inference of discriminatory intent. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000). There is no evidence in this case of any conduct that indicate ill will or animus towards Ms. Allison based on her race, color or national origin.

The lack of any race, color or national origin-related conduct supporting her claims, coupled with plaintiff's conclusory allegations of discrimination, is insufficient to support an inference of discrimination under the McDonnell Douglas burden shifting

framework. Plaintiff asserts that she was terminated, that she is a member of a protected class and that, therefore, the Court should conclude that she was discriminated against. This is insufficient to avoid summary judgment because conclusory allegations, such as Plaintiff's subjective belief that her race, color, and/or national origin were motivating factors in the defendants' decision discharge her, cannot sustain a discrimination claim. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) (summary judgment affirmed where "Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient," (internal citations omitted)).

ii. Defendant Articulated A Legitimate, Nondiscriminatory Reason For Allison's Termination And Plaintiff Has Not And Cannot Prove The Reason Was Pretextual

As argued, supra, even were Ms. Allison capable of proving a prima facie case for discriminatory termination, again, this would not foreclose summary judgment. Ms. Allison cannot show that Defendants' legitimate, nondiscriminatory reasons for her discharge was merely a pretext for discrimination based on her race, color or national origin. Ms. Allison's claim must nonetheless fail because the undisputed evidence demonstrates that the defendant's had legitimate, non-discriminatory, reasons for its actions, and that race was not a factor. "Any legitimate, non-discriminatory reason will rebut the presumption triggered by the prima facie case." Fisher v. Vassar Collage, 114 F.3d 1332, 1335-36 (2d Cir. 1997).

In the instant case, the evidence shows that the defendants imposed discipline on the plaintiff in a non-discriminatory manner. The plaintiff has produced no evidence to the contrary. The evidence shows that the Dana terminated the plaintiff because he (1)

learned plaintiff had informed numerous co-employees, including department heads, that she had accepted a position at another facility and was waiting to receive a holiday bonus from Ellis Manor before tendering her resignation (Dana Deposition at pages 116-117; Affidavit of Carolee Collins attached as Exhibit R; Affidavit of Janet Jerome attached as Exhibit Q); and (2) confirmed with Gail Lagana, who at the time was an employee of the other facility, that plaintiff had, in fact, accepted said position at such facility (Dana Deposition at pages 109-110; Lagana Deposition at pages 9-10). In fact, the plaintiff cannot not deny these facts. Plaintiff admits she told co-employees that she was looking for new employment (Allison Deposition at page 125), that she told department heads that she was conducting a job search (Allison Deposition at page 126), that she told co-employees that she had gotten an offer from the Maple View Manor (Allison Deposition at page 126-127), and that she asked co-employees if they would be receiving a bonus (Allison Deposition at page 130). Allison denies that she told anyone she would accept the position from Maple View Manor or that she was waiting for a holiday bonus before tendering her resignation (Allison Deposition at page 128-129). Ms. Allison, though, ***cannot dispute what was communicated to Dana by Collins and Jerome*** -- that Allison had informed co-employees she had accepted the new position and was remaining until the bonuses were distributed (Dana Deposition at pages 116-117; Affidavit of Collins attached as Exhibit R; Affidavit of Jerome attached as Exhibit Q). Thus, there can be no genuine dispute that these were legitimate and non-discriminatory reasons for Dana's decision to terminate the plaintiff. The plaintiff cannot show that the defendants explanations were "merely pretextual and that the actual motivations more likely than not were discriminatory." Abdu-Brisson v. Delta, 239 F.3d 456, 469 (2d Cir. 2001). It is the

plaintiff's burden to show that the employer's stated reasons for disparate treatment were a pretext for racial discrimination. Proctor v. MCI Communications Corp., 19 F. Supp. 15, 15-21 (D.C.N.Y. 1937). Insofar as the plaintiff claims pretext, there is simply no evidence to suggest that the Dana's stated non-discriminatory reasons for the termination were false, and the plaintiff offers no evidence to support this claim. Therefore, there can be no genuine dispute of material fact because the evidence in the record of this case shows (1) that Dana had legitimate, non-discriminatory reasons for terminating Allison, and (2) that the Allison's race was not a factor in any of the Dana's actions taken in connection with the plaintiff.

iii. The Plaintiff Cannot Show That The Disciplinary Measures Enforced Against Her Were More Severe Than Those Enforced Against Other Similarly Situated Employees.

In her complaint, plaintiff pleads what appears to be facts alleging selective enforcement, i.e. "Defendant did not threaten to terminate Ms. Lagana with termination once Ms. Lagana turned in her resignation in September of 2004" (*Complaint* at Count 3, Paragraph 5). Plaintiff cannot make out a prima facie case of discrimination in the enforcement of the defendant's disciplinary measures because she has put forth no evidence that any other similarly situated employees engaged in the same type of misconduct in which she engaged.

A critical requirement of a viable claim of disparate treatment under Title VII is that a party must demonstrate "that similarly situated employees of a different race were treated more favorably." Shumway v. United Parcel Serv, Inc. 118 F.3d 60, 63 (2d Cir. 1997); Diggs v. Town of Manchester, 303 F. Supp. 2d 163, 176 (D. Conn. 2004)

(Goettel, J.) ("An inference of discrimination may arise if Plaintiff can show that he was treated differently than similarly situated employees of a different race."). In order to make such a showing the plaintiff must compare herself to employees who are "similarly situated in all material respects," Shumway v. United Parcel Serv., Inc., 118 F. 3d 60, 64 (2d Cir. 1997).

Courts in this circuit have noted that:

> Employees are not "similarly situated" merely because their conduct might be analogized. Rather, in order to be similarly situated, other employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards of performance, evaluation, and discipline and **must have engaged in conduct similar to the plaintiffs**, without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it (emphasis added).

Cunliffe v. Sikorsky Aircraft Corp., 9 F. Supp. 2d 125, 131 (D. Conn. 1998) (Arterton, J.), quoting Francis v. Runyon, 928 F.Supp. 195, 203 (E.D. N.Y. 1996).

The plaintiff cannot demonstrate that she and Lagana are similarly situated. While Lagana had, indeed, sought new employment while under the employ of the defendants, the similarities of her conduct as compared to that of the plaintiff's ends at that. Gail Lagana had not engaged in conduct akin to that of the plaintiff. Lagana had not disseminated information to co-employees and department heads that she had been conducting a job search and was leaving for new employment (Dana Deposition at page 135); that Lagana was remaining at Ellis Manor long enough to receive a holiday bonus before tendering her resignation (Dana Deposition at page 136).

Because the plaintiff has failed to demonstrate that she and Ms. Lagana are similarly situated, her discrimination claims are fatally deficient- See Norville v. Staten Island University Hosp., 196 F.3d 89, 95-96 (2d Cir. 1999) (affirming district court's

granting of employer's motion for summary judgment where plaintiff produced insufficient evidence to show that the hospital treated similarly situated white employees more favorably than her); Mangaroo v. Boundless Technologies, Inc., 253 F. Supp.2d 390, 401 (E.D.N.Y. 2003) (granting defendant's motion for summary judgment where black employee, who was disciplined for, inter alia, tardiness, and absenteeism, failed to show that a white employee, who also had instances of tardiness, were similarly situated in all material respects); Bloom v. Jewish Home for the Elderly of Fatrfield County, Inc., 44 F. Supp. 2d 439, 441 (D. Conn. 1999) (Eginton, J.) (granting defendant's motion for summary judgment where white, male nurse, who was terminated, offered no evidence that black, female nurse, who was not terminated, had a comparable employment history).

3. Plaintiff's Subjective Belief of Discrimination Is Not Evidence.

In sum, the only evidence that the defendants discriminated against the plaintiff is nothing more than the plaintiff's own subjective belief, without any evidentiary support, that the Dana's actions were taken against her because of her race, color, and national origin. Her subjective belief that she has been discriminated against, however, is not evidence and does not create a triable issue of fact as to discriminatory motive. A discrimination plaintiff resisting a motion for summary judgment may not rely on her personal speculation as to the employer's motives.

> Mere unsupported speculation. . . is not enough to defeat a summary judgment motion. At bottom, [plaintiff] imputes to [the employer] a discriminatory motive, without factual support. Although courts must carefully consider summary judgment when intent is an issue, "[t]he summary judgment rule would be

> rendered sterile. . . if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." Since [plaintiff] cannot point to any circumstance surrounding her discharge that credibly raises an inference of unlawful discrimination, she failed to make an adequate showing of an essential element of her case.

Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 62 (4th Cir. 1995) *quoting* Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

In this case, the plaintiff's subjective claim that the defendants discriminated against her because she is African American is without any evidentiary support. Therefore, the plaintiff cannot show that the defendants' proffered explanation for its actions is false or that her race is the real reason for the Dana's actions. Also, It is well settled that discrimination laws do not guarantee a sound or proper employment decision, only that a discriminatory reason not be the determinative factor motivating that decision. See e.g., Meiri v. Dacon, 759 F.2d 989, 995 (2d Cir. 1985) ("Evidence that an employer made a poor business judgment generally is insufficient to establish a question of fact as to the credibility of the employer's reasons."); Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981) ("[t]he question before the court is not whether the company's methods were sound, or whether its dismissal of [the plaintiff] was an error of business judgment. . .The question is whether he was discriminated against because of his age"). "Employers should be free to choose how to discipline their employees without being subjected to liability merely because the candidates are of a different race." Seils v. Rochester City School District, 192 F. Supp.2d 100, 112 (W.D.N.Y. 2002).

Accordingly, in the present case, the issue is not whether Dana's decision to terminate the plaintiff was sound, or excessive, but rather the issue is simply whether the

Allison is able to demonstrate that the circumstances surrounding his decisions give rise to an inference of racial discrimination, and if so, whether the defendants are able to present legitimate, non-discriminatory reasons for the decision.

Here, the Dana measured out appropriate discipline for the plaintiff after he learned, after reasonable inquiry, that a high ranking employee was informing co-employees that she had procured a new job and was waiting to receive her holiday bonus before tendering her resignation. Allison's claims amounts to nothing more than that of a person who disagrees with the manner of the discipline imposed upon her and she is unable to rebut the defendants' legitimate non-discriminatory reasons, because the record in this case lacks any evidence whatsoever to defeat a properly supported motion for summary judgment - evidence showing that the defendants' true motivation in disciplining the plaintiff was because due to her race, color or national origin.

4. Additional Undisputed Facts Undermine Any Inference Of Racial Discrimination

In addition the lack of any evidence supporting an inference of pretext, several further undisputed facts contained in the record undercut any claim that Dana's discharge of Ms. Allison was discriminatory.

a. The Fact That Eric Dana Was The Primary Decision Maker With Respect To Both The Hiring And Discharge Of The Plaintiff Creates A "Same Actor Inference", Undermining Plaintiff's Discrimination Claim.

When the same actor hires a person already within the protected class, and then later fires that same person, "it is difficult to impute to [him] an invidious motivation that would be inconsistent with the decision to hire." Carlton v. Mystic Trans., Inc., 202 F.3d 129, 137 (2d Cir. 2000) (quoting Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997)). "This is especially so when the firing has occurred only a short time after the hiring," Grady, 130 F.3d at 560, and the Second Circuit has applied the inference when the hiring and firing were separated by up to three years. See Schnabel v. Abramson, 232 F.3d 83, 91 (2d Cir. 2000). The inference is applicable "so long as one management-level employee played a substantial role in both the hiring and firing of the plaintiff." Ramos v. Marriott Int'l, Inc., 134 F. Supp. 2d 328, 345 (S.D.N.Y. 2001); see also Campbell v. Alliance Nat'lInc., 107 F. Supp. 2d 234, 250 (S.D.N.Y. 2000); Ralkin v. New York City Transit Auth., 62 F. Supp. 2d 989, 1000 (E.D.N.Y. 1999). Several courts have granted summary judgment on the basis, in part, that the same actor inference applied and the plaintiff had presented insufficient evidence of discrimination. See, e.g., Grady, 130 F.3d at 560-62; Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996); Aratari v. Genesee County Sheriffs Office, 2004 WL 1812677, at *4-5 (W.D.N.Y.); Choate v. Transport Logistics Corp., 234 F. Supp. 2d 125, 130-31, 134 (D. Conn. 2002); Pimentel v. City of New York, 2001 WL 1579553, at *6-7 (S.D.N.Y.).

The same actor inference clearly applies in the instant case since Eric Dana was the primary decision- maker with respect to both plaintiff's hiring and her termination.[4] It

[4] Although the Second Circuit Court of Appeals has not yet passed judgment on whether the "same actor inference" applies specifically in the Title VII context, see Feingold v. New York, 366 F.3d 138, 154-55 n.15 (2d Cir. 2004), numerous District Courts within the Second Circuit, as well as other Circuit Courts of Appeal, have held that it does. See, e.g., Aratari v. Genesee County. Sheriffs Office, 2004 WL 1812677, at *4 (W.D.N.Y.); Pimentel v. City of New York, 2001 WL 1579553, at *6 (S.D.N.Y.); Ramos v. Marriott Int'l, Inc., 134 F. Supp. 2d 328, 345-46 (S.D.N.Y. 2001); Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 248-50 (S.D.N.Y. 2000); Ralkin v. New York City Transit Auth., 62 F. Supp. 2d 989, 1000 (E.D.N.Y.

is undisputed that Dana approved plaintiff's hiring as the Assistant DNA and, ultimately, made the decision to hire plaintiff to Acting DNS (Allison Deposition at page 134). It is further undisputed that Dana arranged for Allison to attend an educational course when her appointed her as the Acting DNS (Allison Deposition at page 100-101; Also see DNS Course Registration and payment check attached as Exhibit H), fully subsidized by the defendant, so that she could receive needed training (Dana Deposition at page 39).[5] It is undisputed that when Allison was returned to her position as Assistant Director of Nursing Services ("Assistant DNS") she retained the same salary from when she was appointed the Acting DNS (Dana Deposition at page 137). It is also undisputed that Mr. Dana was the decision-maker regarding the decision to terminate Ms Allison (Allison Deposition at page 134). Furthermore, plaintiff's termination came well within the three year window in which the Second Circuit has applied the same actor inference. Lastly, as a newly hired assistant MDS Coordinator, Allison earned thousand dollars more than the Head MDS Coordinator, Janet Jerome (Dana Deposition at pages 139-140), a Caucasian (Deposition of Elizabeth Johnson at page 37), who had been working at Ellis Manor since 1998 (Affidavit of Janet Jerome attached as Exhibit Q). These facts create a strong inference that Dana's "decision to fire plaintiff was not made with any discriminatory animus," Ramos, 134 F. Supp. 2d at 346, further undermining plaintiff's claims of racial discrimination.

1999); see also Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995); Buhrmaster v. Overnite Trans. Co., 61 F.3d 461, 463-64 (6th Cir. 1995) ("***The plaintiff argues that the same actor inference should be limited to age discrimination cases. We disagree . . .. [The] general principle applies regardless of whether the class is age, race, sex, or some other protected classification***."(emphasis added).

[5] Dana testified that the DNS training course was very expensive for a facility such as Ellis Manor to undertake but that he felt she needed that training, and it would benefit Allson, and ultimately Ellis Manor. (Dana Deposition at page 39).

IV. Conclusion

Based on the foregoing, the plaintiff's case fails. The plaintiff has failed to state a claim of discrimination under either under Title VII, 42 U.S.C. § 1981, or the Connecticut Fair Employment Practices Act. Additionally, under Title VII the plaintiff has failed to make out a prima facie case of race discrimination for both claims of failure to promote and termination. Even if this Court were to determine that the plaintiff has made a prima facie case of discrimination under Title VII, the Court should nonetheless grant the defendants' *Motion for Summary Judgment* because Dana had legitimate, non-discriminatory reasons for not promoting the plaintiff and, thereafter, terminating her, and there is no evidence of pretext or discriminatory motive. For these reasons, there is no genuine issue of material fact, and the defendants are entitled to summary judgment.

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CERTIFICATION OF SERVICE

This is to certify that on October 1, 2007 the foregoing was filed electronically and a copy was served, via overnight mail, upon:

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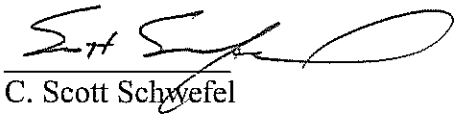

C. Scott Schwefel